SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 571

JACKSONVILLE TERMINAL COMPANY,
a Corporation,
Petitioner,

vs.

IRIS HODGE, As Administratrix of the Estate of
James L. Hodge, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The petitioner, Jacksonville Terminal Company, seeks review by petition for writ of certiorari, pursuant to 28 U.S.C., § 1257, of the decision of the First District Court of Appeal of Florida in *Hodge* v. *Jacksonville Terminal Co.*, Fla.App.1969, 222 So.2d 483, and that of the Supreme Court of Florida, reversing the Court of Appeal decision in part, in *Hodge* v. *Jacksonville Terminal Co.*, Fla.1970, 234 So.2d 645.

These decisions arose out of a wrongful death action brought in the Duval County, Florida Circuit Court by the administratrix of the estate of James L. Hodge, an employee of the defendant Jacksonville Terminal Co., who was killed when his car was struck at a crossing by the defendant's train in Jacksonville, Florida, on September 30, 1962. The action was brought under the Federal Employer's Liability Act, 45 U.S.C., § 51, et seq. and the "train brake" provision of the Safety Appliance Act, 45 U.S.C., § 9. In the state court trial, the trial judge instructed the jury on the issues of both the railroad's FELA negligence and its "absolute" liability under the Safety Appliance Act. The jury returned a general verdict for the plaintiff in the amount of $195,200. Thereafter the railroad filed motions for judgment in its favor notwithstanding the verdict and for a new trial, based upon numerous grounds. The trial judge denied the motion for judgment but granted the motion for new trial on the *single* ground that he had improperly instructed the jury on the Safety Appliance Act issue since, his order stated, "there is no evidence upon which the jury could have properly found that defendant violated [it]: . . ."

Under Florida practice, an order granting a new trial, although obviously not final, may be appealed to the relevant District Court of Appeal. In such an appeal, however, the sole grounds which may be considered by the appellate court are those assigned by the trial judge in granting the new trial. The party, here the defendant-railroad, in whose favor the new trial has been granted, may not cross-assign error, cross-appeal or otherwise argue in *that proceeding* that it was entitled to a judgment or that there should have been a new trial upon grounds not assigned by the trial judge. E.g., *Johnson v. City of Pensacola*, Fla.App.1964, 164 So.2d 844. Any such contentions by the prevailing party on the motion for new trial must await a final judgment against it, either after the new trial has taken place or

the order granting the new trial upon the grounds stated has been reversed. E.g., *Braddock* v. *Seaboard Air Line R. Co.*, Fla.1955, 80 So.2d 662, 668; *Seaboard Air Line R. Co.* v. *Braddock*, Fla.1957, 96 So.2d 127.

In this case, the First District Court of Appeal, on the plaintiff's appeal held, in the portion of its opinion now challenged by the railroad in this Court—that the trial judge had been incorrect in ruling that there was insufficient evidence to justify an instruction concerning the Safety Appliance Act. The legal and evidentiary basis of this holding was stated in the First District opinion as follows, at 227 So.2d 436:

> "There was direct evidence of excessive speed. This is conceded by the defendant. The only evidence of inefficient brakes, however, was circumstantial and consisted of testimony given by members of the train crew on cross examination that the train was traveling at the speed of 15-18 miles per hour. Further, there was testimony that at a speed of 15-18 miles per hour, the distance that it took to stop the train showed that the brakes did not operate efficiently. The latter conclusion being justified by the evidence introduced that the train did not come to a stop until it had reached some 257 feet from [illegible] point of impact. Witnesses testified that efficient brakes applied at the speed of 15-18 miles per hour would have stopped the train within 25 to 40 feet [illegible] feet. These stopping distances were within the range of testimony as to the distance from the crossing that the brakes were applied.
>
> "We think the evidence related above meets the standard of proof set by the federal courts in cases under the Safety Appliance Act. Those decisions govern the question of the sufficiency of the evidence and the type of proof necessary to make out a case under the appliance act. Atlantic Coast Line Railroad Co. v. Barrett, 101 So.2d 37, (Fla.1958). In Myers v. Reading Company, 331 U.S. 477, 67 S.Ct. 1334, 91 L.Ed.

1615, the Supreme Court held that a violation of the subject act is established if the proofs show that the brakes did not operate efficiently on a single occasion and that such proof is not detracted from by other proof that they worked efficiently both before and after the occasion in question.

"Evidence that a train would have stopped in a certain distance at a given speed had the brakes been efficient has been held competent proof of the efficiency of brakes for the purpose of an action brought under the Safety Appliance Act. Nue v. Chicago Great Western Railway Company, 71 Ill.App.2d 347, 219 N.E.2d 111 (1965). It is evidence of this kind that the trial court erroneously held was insufficient to prove Count II in the instant case. We think the issue was correctly submitted to the jury on this evidence."

The District Court, however, went on to hold that the new trial was properly granted upon another basis. 222 So.2d, at 486. This determination was in turn challenged—again by the plaintiff—by a petition for certiorari to the Supreme Court of Florida contending, again under Florida practice, that the District Court decision was in "direct conflict" with prior Florida cases. The Supreme Court agreed, assumed jurisdiction, and in the decision reported at 234 So.2d 645, quashed only that portion of the District Court decision requiring a new trial. It ordered a remand for the entry of a judgment on the jury verdict for the plaintiff. As, under Florida law, it unquestionably has the right to do, the defendant-railroad *has taken an appeal from the judgment entered pursuant to the mandate.* This appeal, challenging various other rulings in the trial court, is now pending in the First District Court of Appeal.

ARGUMENT

The respondent, Mrs. Hodge, contends that the petition should not be granted because (a) the Court lacks jurisdiction since the decisions sought to be reviewed are not "final" as required by 28 U.S.C., § 1257, and (b) on the merits, the Safety Appliance Act holding below does not justify certiorari review.

(a) No jurisdiction.

Since, as we have seen, the judgment which has now been entered pursuant to the decisions sought to be reviewed, is itself now the subject of a proper appeal by the present petitioner, it is obvious that the decisions below do not "terminate the litigation between the parties on the merits of the case", *Georgia Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432, and do not complete and dispose of all elements of the controversy, e.g., *Gospel Army v. Los Angeles*, 331 U.S. 543; *Cotton v. Hawaii*, 211 U.S. 162. Thus, neither decision is a "final" one as is required to confer jurisdiction upon this Court under 28 U.S.C., § 1257. Any attempted review must await a final determination of the petitioner's present appeal in the Florida state courts. See *Seaboard Air Line R. Co. v. Braddock*, supra, cert. den., 355 U.S. 892.

(b) No basis for discretionary review.

On the merits, it is apparent that the District Court's decision, which has been quoted, and which did no more than pass upon the sufficiency of the evidence in a single and unique factual situation, was perfectly correct and entirely in accord with the decisions of this Court.

The petitioner bases its claim as to the "insufficiency" of the evidence of improper brakes upon the contention that the speed estimates *of its own train crew members*

could not as a matter of law have been believed. There is no question, as the District Court said, that if this evidence *were* believed there was sufficient additional testimony showing that the stopping distance required with that speed necessarily implied inadequate brakes. So far from being unjustified or in conflict with prior decisions of this Court, this contention—that evidence must be disregarded as "unbelievable"—flies directly in the face of every FELA and Safety Appliance Act decision of this Court. These cases have stressed, with uncommon emphasis, that questions of credibility and weight of evidence are for the jury and only the jury to determine, and that a court *may not* weigh such evidence in passing upon the question of its sufficiency. E.g.: *Wilkerson* v. *McCarthy*, 336 U.S. 53, *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500.

As the District Court also noted, its determination that this circumstantial evidence of improper braking was sufficient to create a Safety Appliance Act issue, was in full accord with the determinations of this Court in *Myers* v. *Reading Co.*, 331 U.S. 477, to the effect that a braking "inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural and usual manner", 331 U.S., at 483. See also *Noe* v. *Chicago Great Western R. Co.*, 71 Ill.App.2d 347, 219 N.E.2d 111.

REASONS FOR DENYING PETITION

The petition for writ of certiorari should not be granted because:

(1) The Court lacks jurisdiction under 28 U.S.C., § 1257;

(2) On the merits, the decisions below did not decide a question of substance or of broad applicability; they de-

termined only the sufficiency of the evidence in a particular factual setting; and

(3) The federal question concerning the sufficiency of the evidence was decided in accordance with the prior determinations of this Court in analogous, if not identical, situations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief was mailed to Petitioner herein by placing same in the United States mail, properly addressed, postage prepaid, on this the 21st day of September, 1970, to the attorneys named below:

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